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(1)

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

JAMES WOODARD,

Petitioner,

vs.

STATE OF VERMONT AND WILLIAM H. CONWAY, JR., VERMONT COMMISSIONER OF MOTOR VEHICLES,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Vermont

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Vermont charges its residents a four percent purchase and use tax on their cars, without granting a credit to all Vermonters for sales taxes paid elsewhere. 32 V.S.A. §8911(9). However, by agency rule adopted in July of 1985, the Department of Motor Vehicles ceased giving the credit to some Vermonters; specifically those who not only purchased but who also registered their new cars in the state of purchase. In February 1985, Petitioner James Woodard, a lifelong Vermonter, purchased and registered a new car in the State of Florida. When he attempted to register the car in Vermont, he was denied a credit pursuant to 32 V.S.A. §9811(9). Petitioner subsequently filed suit alleging violation of the Equal Protection Clause and the Due Process Clause. The Vermont supreme court dismissed the action for failure to state a claim on November 9, 1990. It held that petitioner should have filed a tax refund claim before the Vermont motor vehicle department rather than bring an original action for deprivation of constitutional rights in Vermont's trial court.

The following questions are presented:

1. Whether the Vermont state courts are required to hear petitioner's constitutional tax challenge under 42 U.S.C. §1983 or the Fourteenth Amendment?

2. Whether Vermont may require petitioners to litigate the constitutionality of a state tax before a state

QUESTIONS PRESENTED – Continued

administrative agency, where no right to a hearing or procedural safeguards is guaranteed and where judicial review is discretionary?[1]

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[1] Many of the questions presented and issues raised in this Petition are identical to those raised in *Williams and Levine v. State of Vermont*, a case also before this Court on a Petition for Writ of Certiorari. Much of the discussion of the issues in this Petition is identical to that in the *William's* Petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE VERMONT SUPREME COURT

Petitioner James Woodard respectfully petitions for a Writ of Certiorari to review the judgment of the Vermont Supreme Court in this Case.

OPINION BELOW

The Opinion of the Vermont Supreme Court (App. 3-28, infra) is reported at 15___ Vt. ___, 2 Vt. L.W. 47 (1991).

JURISDICTION

The judgment of the Vermont Supreme Court was entered on November 9, 1990. A timely petition for reargument was denied on February 1, 1991 (App. 1), but the court revised part of its decision by deleting all references to exhaustion of remedies and issued a new opinion on that day (App. 3-28). On May 2, 1991, Justice Marshall issued an order extending the time for filing a petition for writ of certiorari to and including June 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment XIV, §1, cl. 4, United States Constitution:

   No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

2. Amendment XIV, §1, Cl. 4, United States Constitution:

   No state shall . . . deprive any person of life, liberty or property, without due process of law . . . .

3. Vermont Statutes Annotated, T. 32, §8911: [The test of this statute is reprinted at App. 30-31 of the Appendix].

STATEMENT OF THE CASE

1. Procedural Background.

Petitioner in this case seeks a tax credit to which he is entitled pursuant to 32 V.S.A. §8911(9) for the sales tax he paid in Florida on the purchase of a new car which he then drove home to Vermont, his state of residence. As well, Petitioner seeks a declaratory judgment that the manner in which the Department of Motor Vehicles (hereinafter "DMV") administers the tax-credit scheme under §8911(9) is unconstitutional.

Like many Vermonters, Petitioner purchased a motor vehicle outside the State of Vermont and then returned to Vermont shortly thereafter to register his car in his home state. Petitioner believed he would be entitled to a tax credit for the sales tax he already paid to the reciprocal

state where he purchased the car. He later found out that, because he had registered the car in Florida, he was no longer entitled to the tax credit to which he would have been entitled had he simply driven the car home unregistered. *See Agency of Transportation, Department of Motor Vehicles*, Rule 86-28-E (July 1, 1986). (App. 29.)

In early 1986, Petitioner filed a complaint in Washington County Superior Court seeking declaratory relief. Petitioner sought a declaratory order from the court that the DMV's practice of denying Vermont residents a tax credit under §8911(9) is void and unconstitutional, insofar as the practice imposes a registration fee and license suspension penalty on Petitioner by reason of his status as a Vermont resident who registered his car in a reciprocal state, a penalty and tax which would not be imposed on any Vermont resident who purchased a car under the same circumstances but who did not register that car in the reciprocal State. Petitioner's complaint also sought an order from the Superior Court to refund the purchase and use tax which was denied him when he registered his new car in Vermont. Finally, Petitioner's complaint sought an order awarding him costs and reasonable attorney's fees as authorized by 42 U.S.C. §1988.

Shortly after filing the complaint, this case was designated a complex action and was consolidated with *Williams v. State of Vermont*, Docket No. S436-82WnC. At about the same time, Respondent filed a Motion to Dismiss. That motion was later supplemented and Petitioner filed a response in due course.

After the filing of Appellee's Motion to Dismiss, this case took a remarkably complicated procedural path to its present position. Respondent's Motion was eventually denied. Petitioner then filed a Motion for Summary Judgment which the Court later summarily granted and then, at Respondent's urging, withdrew the order granting Petitioner's motion. Subsequently, upon Respondent's motion to reconsider, the Court entered an opinion and Order, filed on November 2, 1988, dismissing this case.

The case was appealed to the Vermont Supreme Court. That Court handed down an opinion which affirmed the Superior Court but on entirely new grounds. It held that Petitioner was not entitled to relief because §1983 actions for monetary relief cannot be sustained in state court and because Petitioner failed to seek administrative review before filing his original action in Superior Court.

2. Factual Background.

Petitioner, James L. Woodard, is and always has been, a Vermont resident. Petitioner qualifies as a Vermont resident for purposes of determining the availability of the tax credit. 32 V.S.A. §8902(2) and 23 V.S.A. §4(30). Petitioner has continuously held a Vermont driver's license, and none other.

In February, 1985, Mr. Woodard purchased a new Chevrolet automobile from Bruce King Chevrolet, Inc. in Lakeworth, Florida. He paid $14,550.00 for his new automobile plus 7% Florida sales tax of $735.00. Petitioner Woodard also registered his car in Florida.

After purchasing the vehicle, Petitioner Woodard and his wife drove from Florida to their home in Vermont. Approximately 1 1/2 weeks passed from the date of purchase to the date of the Woodards' arrival back in Vermont. The Woodards had taken a scenic route from Florida to Vermont as part of their vacation.

As a resident of Vermont, Petitioner Woodard was required to register his new car with DMV pursuant to 23 V.S.A. §301. During the summer months of 1985, Mr. Woodard attempted to register his new vehicle with the Vermont Department of Motor Vehicles. At that time, he was informed that he would have to pay a purchase and use tax of 4% on the value of his new automobile. The tax assessed was $588.00, representing 4% of the total new value of Mr. Woodard's automobile of $14,550.00, despite the fact that he had paid a 7% tax in a reciprocal state (Florida).

Mr. Woodard paid the Vermont tax under protest. After repeated contact with the Governor's office and the Department of Motor Vehicles, Mr. Woodard was informed by commissioner William H. Conway on August 26, 1985 that the Vermont tax was properly imposed on his automobile.

Under 32 V.S.A. §8911(9) a Vermont resident is exempted from payment of the purchase use tax when he registers his car in Vermont after having purchased it in an outside state and after having paid a sales or use tax in that state, so long as the state or province collecting such a tax would grant the same pro rata credit for a Vermont tax paid under similar circumstances in this state. The state of Florida, in which Petitioner acquired his car,

grants such a pro rata credit for Vermont taxes and thus qualifies as a reciprocal state under §8911(9). *See* 10A V.S.A. §2061. Thirty-five of the fifty states grant such a credit.

In July of 1985, DMV filed a proposed rule pursuant to the Vermont Administrative Procedure Act. This proposed rule did not become an actual regulation of the Department until a year later, in July of 1986. In the proposed rule application, DMV indicated that "this rule reflects the existing practice of the Department."

This case is similar to its companion case, *Williams v. State of Vermont*. That case, too, has travelled a remarkably complex procedural path. A significant turn in that path came in June of 1985, when this Court ruled that the Plaintiffs, there, had made out a *prima facia* case for their claim that Vermont's Motor Vehicle Purchase and Use Tax was unconstitutional in that it violated the equal protection clause of the United States Constitution. The Plaintiffs in the *Williams* case are out-of-staters who bought, registered and paid sales taxes on motor vehicles in other states. Those individuals then moved to Vermont and were forced to pay a use tax on the same motor vehicle. The *Williams* Plaintiffs claim that Vermont's purchase and use taxing scheme is unconstitutional in that it creates two separate classes of taxpayers – individuals who move to Vermont and seek to register their motor vehicles here and individuals who are Vermonters but purchase their cars in other states and then register their cars here. The latter class are granted a tax credit against the sales or use tax paid in the outside state, whereas the former class of individuals are not permitted a similar credit. The *Williams* Plaintiffs claim that this discrimination between

classes of individuals is unconstitutional because there is no rational basis for the distinction between them. This Court agreed and remanded the case for a factual determination as to whether the statute was, though facially unconstitutional, saved by a constitutional administration.

Shortly after remand, in July of 1985, as mentioned above, DMV attempted to cure the unconstitutional nature of the statute by limiting the tax credit provided to Vermonters. Although in its proposed rule, DMV stated that its object was merely to codify existing practice, what limited discovery has been permitted to occur suggests that practice was, at a minimum, inconsistent and some Vermonters who purchased and registered cars in reciprocal states were afforded a tax credit upon registration in Vermont. At any rate, the rule states that Vermonters who buy and register their cars in reciprocal states will not be entitled to the tax credit. Only those Vermonters who buy their cars and other states but do not register them in that state are entitled to a tax credit in Vermont. Thus, the Department of Motor Vehicles attempted to eliminate the discrimination between out-of-staters who purchase, pay a tax on, and register their cars out of state and Vermonters who do exactly the same by denying those Vermonters the §8911(9) credit.

In so doing, however, DMV created a new type of discrimination. The statute discriminates between Vermonters who purchase, pay a tax on, and register their cars out of state and those who simply purchase, pay a sales tax on, but do not register their cars out of state. The only basis for this new discrimination was an attempt on

the Department's part to eliminate the type of discrimination that existed in the *Williams* case. Clearly, this basis for the discrimination between Vermonters cannot withstand constitutional scrutiny.

3. The Vermont Supreme Court Opinion.

In an opinion dated November 9, 1990, and reissued with modifications on February 1, 1990, the Vermont Supreme Court ruled *sua-sponte* that exhaustion of administrative remedies was a necessary prerequisite to suit. (App. 3-28). In fact, it affirmed the dismissal and held that this was the sole recourse available to Petitioner. *Id.* The court also ruled that Petitioner's tax refund claim failed to state a cause of action under §1983, because a state or state official acting in his official capacity is not a "person" within the meaning of that section when monetary relief is sought.[2] It also rejected petitioners' claim for a refund directly under the 14th Amendment, distinguishing four decisions of this Court providing such relief. (App. 7). It concluded: "none of these cases expressly provide a right of action directly under the Constitution" and "all these cases long predate the development of modern §1983 law." (App. 12, n.7).

The supreme court did acknowledge that Vermont was constitutionally required to provide a remedy for

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[2] The court assumed that Respondent Conway was being sued only in his official capacity, although the complaint does not so state. As in federal practice, Rule 12, V.R.Civ.P., requires all doubts raised by the pleadings to be construed against the moving party.

unlawful taxes under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990). In so ruling, it reversed the superior court and its own prior decision in *American Trucking Assns. v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), which held that the state could refuse to refund unconstitutional taxes on sovereign immunity grounds. (App. 20). However, it concluded that an administrative hearing before the motor vehicle department was all that *McKesson* required. *Id.*

Finally, the Vermont supreme court held that petitioner was not entitled to declaratory relief under §1983. First, it said, the Vermont Declaratory Judgment Act does not expand the court's jurisdiction beyond what is already authorized by the legislature. Here, the legislature has restricted tax refund claims to the motor vehicle department. (App. 21-28). Severed from the refund claim, the court continued, the petitioners' request for declaratory relief does not provide a justiciable controversy, since petitioner is unlikely to be denied a tax credit again. *Id.*

Petitioner filed a timely motion for reargument on November 26, 1990. Among other things, he asserted that the administrative exhaustion requirement imposed by the court conflicts with *Felder v. Casey*, 487 U.S. 131 (1988). Without agreeing that constitutional tax refund actions are foreclosed under §1983 or the 14th Amendment, petitioner also argued that declaratory actions are available even where tax refunds are not. Finally, petitioner suggested that if the court wants the motor vehicle department to make a factual determination, it should remand the action there rather than dismissing it outright. At least, petitioner concluded, the court should clarify what

statute of limitations applies with respect to refund claims filed with the department.

On February 1, 1991, the Vermont supreme court denied petitioner's motion for reargument in all respects. (App. 1) It declined to remand the action to the motor vehicle department or to clarify what statute of limitations applied. However, the court did "delete[ ] certain references in the opinion to exhaustion of remedies; that doctrine plays no role in our decision." *Id.*[3]

REASONS FOR GRANTING CERTIORARI

Review is essential to ensure that this Court's decision in the *Williams* case is given proper effect and to resolve fundamental constitutional issues raised by the Vermont supreme court's second dismissal. With respect to the first question, the Vermont courts have failed to require a factual determination as to whether, in practice, the Vermont purchase and use tax credit is administered in a fashion that satisfies the Equal Protection Clause. Rather than determining the constitutionality of the states practice, the state supreme court dismissed the case on the pleadings, on grounds which the respondents either did not think of or chose not to assert to this Court or any other during the first three years of litigation. Such a result frustrates judicial economy, prejudices the petitioner, and conflicts with the mandate rule established by this Court.

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[3] In fact, the court eliminated the final two pages of its initial slip opinion entirely.

In dismissing, the Vermont supreme court also raised issues of constitutional and federal law which go well beyond the state tax statute at issue. The first is whether actions for declaratory relief or tax refunds are available in state court under §1983 or the 14th Amendment at all. This Court has twice reserved the question of whether §1983 jurisdiction is mandatory in state court, and state courts considering constitutional tax challenges are divided on the point. The Vermont supreme court interpreted *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304 (1989), to preclude tax refund actions under §1983, even though *Will* involved legal damages rather than a tax refund. It also held that petitioner's declaratory relief claim was moot, despite rulings by this Court that constitutional tax challenges cannot be rendered moot by changes in tax laws or by the unavailability of a refund. *See, e.g., Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989); *Montana National Bank of Billings v. Yellowstone County of Montana*, 276 U.S. 499 (1928). Finally, the Vermont supreme court rejected a number of decisions of this Court, suggesting that relief is available directly under the 14th Amendment.

Even if a judicial cause of action is not available under §1983 or the Fourteenth Amendment, however, the administrative remedy to which petitioner has been relegated fails to satisfy minimum due process requirements. That administrative remedy allows Respondent Conway to make the decision of whether to hold a hearing and, if he does, whether to permit discovery or enforce any evidentiary or procedural rules. Judicial review of Respondent Conway's decision is left to the discretion of the courts.

This Court has established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and subsequent cases that one may not be deprived of property without fair procedures and a meaningful hearing. Only last year, this Court reaffirmed that this rule applies to state taxes. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 L. Ed. 2d 17, 35-36 (1990). Further, in cases like the instant one which involve not just the deprivation of property but the deprivation of constitutional rights, this Court has held that a judicial determination of facts and law is required *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

I. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE WHETHER STATE COURT TAX CHALLENGES ARE AVAILABLE UNDER §1983 OR THE FOURTEENTH AMENDMENT.

The Vermont supreme court's decision raises considerable concerns under the Constitution and federal law. The first is whether state courts must recognize a judicial cause of action for constitutional tax challenges under 42 U.S.C. §1983 or the Fourteenth Amendment. This issue assumes unique importance in the state tax context, since the Tax Injunction Act of 1937 and Eleventh Amendment severely limit federal court jurisdiction and remedies.[4]

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[4] Federal courts are precluded from hearing almost all challenges to state and local taxations by the Tax Injunction Act, 28 U.S.C. §1341 (1982). *See* E. Chemerinsky, *Federal Jurisdiction* §11.3, at 570-76 (1989). This Court has made clear that the act limits not only injunctive relief but also declaratory

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Review is essential to resolve a deep split in the state courts on this issue and to correct substantial errors in the decision below.

The Vermont supreme court remitted petitioner to the state motor vehicle department because, it held, they had failed to state a cause of action for judicial relief under either 42 U.S.C. §1983 or the Fourteenth Amendment. Vermont thus became one of at least nine states refusing to recognize a judicial action for constitutional tax challenges.[5] On the other hand, courts in four states, including two state supreme courts, have concluded that they are obligated to hear such claims, while at least seven

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judgments and damages. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982); *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 113 (1981). It also has established that the Eleventh Amendment prohibits tax refunds in federal court, absent the state's consent. *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945).

[5] In six of the other eight states, the decision was handed down by the highest court of the state. The cases are *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985); *Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976); *Vann v. DeKalb County Board of Tax Assessors*, 186 Ga. App. 208, 367 S.E.2d 43 (1988) (following *Backus*); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) (*en banc*); *Strain v. Baryla*, No. TSB-H-84(44)S (N.Y. St. Tax Comm'n June 1, 1984) (LEXIS, States library, Alltax file); *Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984); *Linderkamp v. Bismarck School Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986); *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984); *aff'd by an equally divided court*, 471 U.S. 82 (1985); *Davis v. City of Elkhorn*, 132 Wis. 2d 394, 393 N.W.2d 95 (1986).

others have assumed jurisdiction without discussion.[6] This Court has stated that "[w]hether state courts must assume jurisdiction over [§1983 suits challenging state taxation] is not entirely clear," *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987), and it has twice left open the question of whether state court must hear §1983 actions at all. *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). In *Spencer v. South Carolina Tax Commission*, 471 U.S. 82 (1985), an equally divided court affirmed without opinion a state case refusing to exercise jurisdiction over a §1983 tax claim. Commentators have favored mandatory state court jurisdiction for constitutional tax claims. *See, e.g.*, Taylor, "§1983 in State Court: A Remedy

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[6] Courts holding that jurisdiction is mandatory include *Beverly Bank v. Board of Review*, 117 Ill. App. 3d 656, 453 N.E.2d 96 (1983), *cert. denied*, 466 U.S. 951 (1984); *Allison v. Board of County Comm'rs*, 241 Kan. 266, 737 P.2d 6 (1987); *Burrell v. Mississippi State Tax Commission*, 536 So. 2d 848 (Miss. 1988) (*en banc*); *Bung's Bar & Grille, Inc. v. Township Council*, 206 N.J. Super. 432, 502 A.2d 1198 (Law Div. 1985).

State courts which have entertained §1983 tax actions without discussing jurisdiction include *Town of Eclectic v. Mays*, 547 So. 2d 96 (Ala. 1989); *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402 (1987); *Satellink of Chicago, Inc. v. City of Chicago*, 168 Ill. App. 3d 689, 523 N.E.2d 13 (1988); *Uretsky v. Baschen*, 47 Ill. App. 3d 169, 361 N.E.2d 875 (1977); *Dutoit v. Board of County Comm'rs*, 233 Kan. 995, 667 P.2d 879 (1983); *Porter v. Treasurer & Collector of Taxes*, 385 Mass. 335, 431 N.E.2d 934 (1982); *Department of Treasury v. Campbell*, 161 Mich. App. 526, 411 N.W.2d 722 (1987); *423 South Salina St. v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986), *cert. denied*, 481 U.S. 1008 (1987); *Holden Arboretum v. City of Kirtland*, 19 Ohio App. 3d 125, 483 N.E.2d 167 (1984); *Brower v. Wells*, 103 Wash. 2d 96, 690 P.2d 1144 (1984) (*en banc*).

for Unconstitutional State Taxation," 95 Yale L. J. 414 (1985); Note, "Clarifying Comity: State Court Jurisdiction and §1983 State Tax Challenges," 103 Harv. L. Rev. 1888 (1990).

In refusing jurisdiction under the Fourteenth Amendment, the Vermont supreme court rejected multiple decisions of this Court suggesting that tax refund actions are available directly thereunder. *See Jackson County v. United States*, 308 U.S. 343, 350-51 (1939); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 246-47 (1931); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679 (1930); *District of Columbia v. Thompson*, 281 U.S. 25, 31-33 (1930); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Montana National Bank v. Yellowstone County*, 276 U.S. 499, 504-05 (1928); *Ward v. Love County*, 253 U.S. 17 (1920); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468 (1912); and *Atchison, Topeka & Santa Fe Railway v. O'Connor*, 223 U.S. 280 (1912). Although this Court has emphasized that a judicial remedy is the rule when constitutional rights are violated, *Carlson v. Green*, 446 U.S. 14, 26 (1980) (Powell, J. concurring), and despite the fact that this Court recognized the continuing vitality of *Iowa-Des Moines National Bank* just two years ago in *Davis v. Michigan Department of Treasury*, 109 S. Ct. 1500, 1508-09 (1989), the Vermont supreme court concluded that *Ward* and similar cases were irrelevant in the face of modern §1983 law and that the Fourteenth Amendment could not overcome state sovereign immunity. (App. 10, n.7)

Finally, the Vermont supreme court held that no §1983 action for a tax refund was available because Respondent Conway was not a "person" within the

meaning of the statute. The court relied on *Will v. Michigan Department of State Police*, 109 S. Ct. 2304 (1989) for its conclusion, but the reasoning there does not support such a result. In *Will*, this Court held that a state employee, acting in his official capacity, could not be sued for *damages* under §1983 in connection with a claim of illegal employment practices. *Id.* at 2307-08. The Court reasoned that Congress had not intended to disturb traditional notions of state sovereign immunity when it enacted §1983. *Id.* at 2309. Crucially, however, such notions of sovereign immunity did not extend to actions for equitable relief – including actions for tax refunds. That point is made clear by the cases relied on in footnote 10 of the *Will* opinion, many of which required state officials to return unconstitutional taxes and other property obtained in tax seizures, 109 S. Ct. 2311-12, n.10. It is explained in detail in Justice Stevens' dissent. 109 S. Ct. at 2323.[7] The Vermont supreme court's decision does not abide by established principles of state sovereign immunity; it expands them. That result is contrary to the "unique federal remedy" §1983 provides. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

In sum, the Vermont supreme court's decision not to recognize petitioner's tax challenge under either the Fourteenth Amendment or §1983 points up a deep and

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[7] Other members of this Court also have recognized the "broad and well-established power of courts to provide equitable relief for constitutional wrongs," as opposed to the narrower and more recent recognition of damage actions under the Constitution. *See Carlson v. Green*, 446 U.S. 14, 42-43 (1980) (Rehnquist, J., dissenting).

unresolved split among the state courts and raises important questions of constitutional and federal law. The lower court has called into question precedents of this Court holding that refund actions are available under the Fourteenth Amendment; it has ignored others in denying a right to declaratory relief; and it has extended *Will* beyond its logical bounds in denying a §1983 refund action. This Court should accept review to insure that constitutional tax claims are treated properly and uniformly, regardless of which state court they happen to be filed in.

II. THE ADMINISTRATIVE REMEDY CONJURED UP BY THE VERMONT SUPREME COURT FAILS TO SATISFY MINIMUM FEDERAL DUE PROCESS REQUIREMENTS.

Even if state courts were not required to hear constitutional tax challenges under §1983 or the Fourteenth Amendment, state law remedies still would need to satisfy basic due process requirements. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 L.Ed.2d 17, 35-36 (1990). The remedy left to petitioner by the Vermont supreme court, a second tax refund request under Vt. Stat. Ann. title 32, §8912, falls well short of the mark. It includes neither the right to a hearing, necessary procedural guarantees, nor mandatory judicial review. The decisions of this Court suggest emphatically that such a remedy is constitutionally insufficient.

Section 8914 of title 32, Vt. Stat. Ann., sets forth the sole remedy for taxpayers challenging motor vehicle tax assessments. It provides: "Any overpayment of such tax as determined by the commissioner shall be refunded."

Under the state motor vehicle statutes, the decision of whether to conduct a hearing at all is left to the Commissioner, as is the question of what discovery shall be permitted and what procedures observed. Motor vehicle department proceedings are specifically exempted from coverage by the Vermont administrative procedure act, which otherwise requires procedural guarantees in agency cases. *See* Vt. Stat. Ann. tit. 3, §816(b).[8] No motor vehicle department hearing procedures have been published. *See* 6 Code of Vermont Rules, Motor Vehicle Department pp. 14050001 *et seq.* (Weil 1989).

Besides the lack of procedural safeguards, no established right of judicial review exists from tax refund denials under §8914. The Vermont supreme court has refused to imply a right of judicial review from agency proceedings where, as here, the governing statute does not specifically require a hearing. *Reed v. Department of Public Safety*, 137 Vt. 9, 398 A.2d 301 (1979); *Fitzpatrick v. Vermont State Retirement System*, 136 Vt. 510, 394 A.2d 1138 (1978). While the court has suggested that review may be available in such cases by certiorari, *Campbell v. Manchester Board of School Directors*, 152 Vt. 643, 565 A.2d 1318 (1989) (mem.), such review is left to the discretion of the reviewing court. *Lewis v. Holden*, 118 Vt. 59, 99 A.2d 758 (1953).

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[8] The wide discretion permitted the Commissioner is conspicuous in the context of other Vermont tax statutes. Both the Vermont income tax and the general sales and use tax statutes contain very precise procedures and provisions for judicial review, for example. *Cf.* Vt. Stat. Ann. tit. 32, §§5881-5895 (income tax); §§9811-9818 (general sales and use tax).

This Court has long insisted that state tax remedies must comport with the Due Process Clause, *Central Georgia Railway Co. v. Wright*, 207 U.S. 134 (1907), and recently has reiterated the point. *McKesson*, 110 L.Ed.2d at 35-36. Under the due process test developed in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and subsequent cases, the right to some form of hearing is a minimum requirement where an individual is deprived of life, liberty or property. This Court also has mandated judicial review where agency fact-finding methods are inadequate. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) (under Administrative Procedure Act).

The allegation here is not merely deprivation of property, moreover, but the deprivation of constitutional rights. Petitioner contends that he was forced to pay additional taxes in violation of this constitutional right to equal protection.[9] Where such "constitutional facts" are at issue, the Due Process Clause requires not merely an administrative hearing but a *judicial* determination of the facts and law. *See Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) (eminent domain); *see also St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 (1936). This principle, too, has lately been reaffirmed. *See Connick v. Myers*, 461 U.S. 138, 148-150 & n.10 (1983) (collecting cases) *See also* Note, "De Novo Judicial Review

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[9] Accordingly, this case must be contrasted with such due process decisions as *Parratt v. Taylor*, 451 U.S. 527 (1981), which involve the deprivation of property only. *Parratt* would be analogous if the warden there had confiscated the prisoner's property because he exercised First Amendment rights or because the prisoner was black, or for some other reason forbidden by the Constitution.

of Administrative Agency Factual Determinations Implicating Constitutional Rights," 88 Columbia L. Rev. 1483 (1988); Strong, "The Persistent Doctrine of Constitutional Fact," 46 N.C.L. Rev. 223 (1968). As this Court has emphasized: "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). *See also Burnett v. Grattan*, 462 U.S. 42, 50 (1984) ("the dominant characteristic of civil rights actions: they belong in court.").

The Vermont supreme court's ruling that petitioner's sole remedy on remand was to request a refund again from Respondent Conway under §8914 cannot be squared with basic due process demands. Nothing compels Respondent Conway to provide a hearing or any procedural safeguards attendant thereto; and nothing compels the Vermont courts to provide judicial review. This Court should accept review to insure that petitioner is not deprived of his rights under the Equal Protection Clause through a deprivation of his due process guarantees.

CONCLUSION

For the above reasons, this Court should accept Petitioner's Petition and review the important but unsettled issues it raises.

Dated at Burlington, County of Chittenden, State of Vermont, this 10th day of June, 1991.

Respectfully submitted,

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Attorney for Petitioner

ENTRY ORDER

SUPREME COURT DOCKET NOS. 88-309 and 89-042

MARCH TERM, 1990

Norman Williams and Susan Levine	)	APPEALED FROM:
v.	)	Washington Superior Court
State of Vermont and William H. Conway, Jr., Vermont Commissioner of Motor Vehicles	)	DOCKET NOS. S436-82Wnc S56-86WnC
Valerie M. Quinn and James Woodard	)	(Filed Feb 01, 1991)
v.	)	
State of Vermont and William H. Conway, Jr., Vermont Commissioner of Motor Vehicles	)	

In the above entitled cause the Clerk will enter:

Appellants' motion for reargument is denied. We have deleted certain references in the opinion to exhaustion of remedies; that doctrine plays no role in our decision. We decline to remand the case to an agency from which it never originated. We decline to discuss statute of limitation issues which were never briefed or argued and express no view thereon.

Motion for reargument is denied.

BY THE COURT:

/s/ Frederic W. Allen
Frederic W. Allen, Chief Justice

/s/ Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

/s/ Joseph J. Wolchik
Joseph J. Wolchik, District Judge
Specially Assigned

/s/ Matthew I. Katz
Matthew I. Katz, Superior Judge
Specially Assigned

/s/ Shireen Avis Fisher
Shireen Avis Fisher, District Judge
Specially Assigned

[ ] Publish

[ ] Do Not Publish

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 111 State Street, Montpelier, Vermont 05602 of any errors in order that corrections may be made before this opinion goes to press.

Nos. 88-309 and 89-042

Norman Williams and Susan Levine

v.

State of Vermont and William H. Conway, Jr., Vermont Commissioner of Motor Vehicles

Valerie M. Quinn and James Woodard

v.

Supreme Court

On Appeal from Washington Superior Court

March Term, 1990

State of Vermont and
William H. Conway, Jr.,
Vermont Commissioner of
Motor Vehicles

Alden T. Bryan, J.

O'Neill and Crawford and Norman Williams, pro se, Burlington, for plaintiffs-appellants Williams and Levine

Mary P. Kehoe of Gear and Davis, Inc., Burlington, for plaintiff-appellant Woodard

Jeffrey L. Amestoy, Attorney General, and Thomas R. Viall and Andrew M. Eschen, Assistant Attorneys General, Montpelier, for defendants-appellees

PRESENT: Allen, C.J. and Gibson, J., and Wolchik, D.J., Katz, Supr. J., and Fisher, D.J., Specially Assigned

KATZ, Supr. J., Specially Assigned. Plaintiffs filed suit in Washington Superior Court to secure refunds of taxes paid to the Department of Motor Vehicles upon first registering automobiles in Vermont. The superior court dismissed plaintiffs' claims. We affirm.

I. Record

In 1980, Norman Williams purchased and registered a Volkswagen Dasher in Illinois, his state of residency at the time, and paid the five percent Illinois sales tax. In 1981, he moved to Vermont with his car. When he subsequently applied to register the vehicle with the Vermont Department of Motor Vehicles, he was required to pay Vermont's four percent use tax pursuant to 32 V.S.A. § 8903(b). Believing the tax was unconstitutional, as it did not apply to *Vermont* residents who purchased and paid a

sales tax on vehicles in reciprocating states (including Illinois), see § 8911(9),[1] Williams brought suit in federal court under 42 U.S.C. § 1983 to enjoin enforcement. That suit was dismissed on the authority of the Tax Injunction Act, 28 U.S.C. § 1341. Williams then paid the tax and initiated an administrative proceeding, pursuant to 32 V.S.A. § 8914, for a refund. The Motor Vehicles Department felt constrained to assume the constitutionality of the tax scheme and denied relief.

Williams then filed the present action in superior court, serving the State and Commissioner Conway, pursuant to V.R.C.P. 4(d)(2), by serving the Attorney General. Susan Levine joined the action in an amended complaint. Levine, like Williams, had moved to Vermont from another state, bringing her car with her. She had purchased a Chrysler Horizon in New York and paid the seven percent New York sales tax. When she registered

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[1] Section 8911(9) provides:

> The tax imposed by this chapter shall not apply to:
>
> . . .
>
> (9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference.

the car in Vermont, she was required to pay the state use tax.

In their complaint, Williams and Levine requested refunds of the respective use taxes as well as a declaratory judgment that the tax scheme violates several provisions of the United States Constitution: article I, section 8, clause 3 (Commerce Clause); article IV, section 2 (Privileges and Immunities); and the Fourteenth Amendment (Equal Protection and Privileges and Immunities Clauses). Although now in state court, the complaint rests on the federal cause of action provided by 42 U.S.C. § 1983.

The State filed a motion to dismiss, asserting the constitutionality of the statute. The motion was granted and Williams and Levine appealed to this Court, which affirmed on the strength of our opinion in *Leverson v. Conway*, 144 Vt. 523, 481 A.2d 1029 (1984). The United States Supreme Court then granted certiorari, reversed our decision, declared the statute invalid under the Equal Protection Clause of the Fourteenth Amendment, as it purported to afford unequal treatment to state residents and nonresidents without sufficient justification, and remanded for further proceedings. *Williams v. Vermont*, 472 U.S. 14 (1985). We, of course, remanded to the superior court. There, the State filed an answer raising, among other defenses, sovereign immunity.

In 1985, while a Vermont resident, James Woodard purchased and registered a vehicle in Florida, paying that state's seven percent sales tax. Upon transferring the registration to Vermont, he was told he had to pay

Vermont's use tax. He brought suit in superior court[2] seeking a refund and a declaration that the Department of Motor Vehicles' practice[3] of not affording a tax credit to Vermont residents in his situation – that is, having registered a vehicle out of state prior to returning to Vermont – is both contrary to the statutory scheme and in violation of several provisions of the Vermont Constitution as well as the Fourteenth Amendment to the United States Constitution.

None of the plaintiffs specify any relief against Conway personally. Nor are any allegations made to suggest any conduct on his party, other than that of the Department generally, of which he was Commissioner.

Although nominally consolidated below, the superior court issued separate decisions dismissing the respective complaints. As to the Williams/Levine request for declaratory relief, the court held that the equal protection issues were moot, in light of the Department of Motor Vehicles'

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[2] Valerie Quinn joined Woodard's complaint, but she did not join this appeal.

[3] Subsequently, the Department formalized this practice by adopting a rule. See Agency of Transportation, Department of Motor Vehicles, Rule 86-28-E ("Motor Vehicle Purchase and Use Tax") (July 5, 1986). The rule states that the credit provided in 32 V.S.A. § 8911(9) shall be available to Vermont residents only if the registrant "has not previously registered that vehicle in the state where it was acquired or in any other state." *Id.* at (1)(d). In materials filed with the proposed rule, the Department maintained that the "rule reflects the existing practice of the Department." Cover Sheet for Proposed Rule, Motor Vehicle Purchase and Use Tax (July 2, 1985).

1986 regulation denying the tax credit of § 8911(9) to Vermonters who purchase and *register* cars out of state. Upholding the regulation as consistent with the meaning and intent of the statute, the court reasoned: "Because section 8911(9) [as clarified by the regulation] now explicitly provides no special treatment for residents, it is facially constitutional and would survive the equal protection scrutiny used by the *Williams* court. Therefore, the plaintiffs no longer can request declaratory judgment . . . because the equal protection issues concerning what section 8911(9) means and how the exemption must be applied are now moot." As to their claim for a tax refund, the court held that recovery was barred by sovereign immunity, relying on *American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), *cert. denied*, 483 U.S. 1019-20 (1989). As to the Woodard/Quinn complaint, the superior court reached the merits, upheld the Department's regulation against plaintiffs' several challenges, and granted the State's motion to dismiss.

Appeals were taken from both rulings. We affirm, but for reasons differing in several respects from those espoused by the superior court.

II. Claim for Refund

A. 42 U.S.C. § 1983

Both complaints are explicitly and solely founded on 42 U.S.C. § 1983, the Reconstruction Era civil rights statute which provides a private remedy for those alleging abridgment of federal rights by "persons" acting "under color of" state law. Although § 1983 was clearly intended to provide a federal forum for those seeking vindication

of federal rights, there is no bar to the statute's use in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980); *Beauregard v. City of St. Albans*, 141 Vt. 624, 626, 450 A.2d 1148, 1149 (1982).

However, § 1983 may not be used to make a claim for relief against a state, as states are not "persons" within the meaning of the statute. *Will v. Michigan Dep't of State Police*, 109 S.Ct. 2304, 2308 (1989). Manifestly and explicitly, the State of Vermont is the defendant in these cases. The purpose for each of these plaintiffs having commenced suit was and remains the refund of all or part of the Vermont use tax paid on their respective autos. The actions seek retrospective relief that can come only from the State treasury. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest . . . even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Under *Will*, § 1983 is not available for such relief.

At oral argument and in a supplementary brief, Mr. Williams suggested that footnote 10 of *Will*, 109 S.Ct. at 2311, supports his position, and exempts the present cases from the clear and general rule laid down by *Will*. We fail to see how. In pertinent part, footnote 10 states:

> Of course, a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official capacity actions for *prospective relief* are not treated as actions against the State." This distinction is "commonplace in sovereign immunity doctrine," and would not have been foreign to the 19th-century Congress that enacted § 1983.

Id. at 2311 n.10 (citations omitted: emphasis supplied). The actions presently before this Court are not for prospective relief. Rather, these are actions to recover money already spent.[4] As Justice Stevens notes in dissent, the holding of *Will*, and in particular, footnote 10, is that while a state or its agent sued in an official capacity may be sued under § 1983 for injunctive relief, they may not be so sued for monetary relief. *Id.* at 2323.[5] Absent waiver, the Eleventh Amendment[6] bars a damages action

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[4] In an effort to style the relief requested as prospective, Mr. Williams also urges that he should be permitted to receive a credit against future taxes for any sums held wrongfully. Such a remedy is without support in law. If he were correct, such a "credit" would constitute nothing less than a total end run around the sovereign immunity doctrine. A state's immunity would be so tractable as to be useless.

[5] Footnote 10 of *Will* cites *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), and *United States v. Lee*, 106 U.S. 196 (1882), among others, as cases presumably on the side of prospective relief; plaintiffs assert that the reference to these cases supports their position. *Osborn* does require certain state officials were already under an injunction not to take the funds. *Osborn* merely upholds a federal court's power to enforce an injunction ordering state officials not to violate federal law. In the present case, plaintiffs never obtained an injunction before paying the tax. In *Lee*, the Court ordered a return of wrongfully taken real property, and the case, in any event, was a suit against *federal* officers.

[6] The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

(Continued on following page)

against the state brought in federal court; *Will* makes clear that § 1983 does not provide an avenue for the same relief in state court. "*Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court." *Howlett v. Rose*, 110 S. Ct. 2430, 2437 (1990); see also *Edelman v. Jordan*, 415 U.S. 651, 663, 678 (1974) (action to recover wrongfully withheld welfare payments from state funds barred as action against state); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. at 462-63 (action seeking refund of taxes collected by state in violation of federal law barred as action against state); Note, *Clarifying Comity; State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 Harv. L. Rev. 1888, 1896 (1990) (discussing import of *Will* on state tax litigation).

Accordingly, we reject plaintiffs' claims for monetary relief against the State or Commissioner Conway under § 1983.[7] Assuming the complaints also rest on state causes

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Although the text does not address suits against a state by its own citizens, the Supreme Court has long held that the Amendment's bar encompasses such suits. *Hans v. Louisiana*, 134 U.S. 1 (1890). By its terms, the Amendment restrains only the federal courts; "[n]o Eleventh Amendment question is present . . . where an action is brought in a state court." *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

[7] Plaintiffs also argue on appeal that their causes of action proceed directly from the Fourteenth Amendment of the United States Constitution. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971) (private damage action against federal officials implied from Fourth Amendment). We do not

(Continued on following page)

of action (although they are designated solely as § 1983 actions), we next consider the State's defense of sovereign immunity.

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believe a *Bivens*-type action may be brought directly under the Fourteenth Amendment in light of Congress' express provision in 42 U.S.C. § 1983 for a damage remedy against state officials who have violated federal law. The Court in *Bivens* created a remedy against *federal* officials, who are not subject to liability in § 1983 actions. "Indeed, one of the reasons the Court in *Bivens* held that individuals whose Fourth Amendment rights were violated by Federal officials had an implied cause of action for damages directly under the Constitution was that no other remedy was available." *Tarpley v. Greene*, 684 F.2d 1, 10 (D.C. Cir. 1982); see Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499, 591 n.472 (1985); Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 22 (1985) ("In *Bivens*, the Court put together a working equivalent of § 1983 for constitutional claims against federal officials"); cf. *Bush v. Lucas*, 462 U.S. 367, 380-90 (1983) (no damages remedy implied directly from Constitution where Congress has provided statutory remedies).

Plaintiffs rely on several early cases *seeking refunds of state or local taxes claimed to be unconstitutional. Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Ward v. Love County*, 253 U.S. 17 (1920); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468 (1912); *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280 (1912). But none of these cases expressly provide a right of action directly under the Constitution. Indeed, four of them were initiated in state court and presumably were founded on state law causes of action. Only *Atchison* began in federal court, but the opinion does not specify on what basis federal jurisdiction was

(Continued on following page)

B. Sovereign Immunity

1. Scope of Remand

After remand from the United States Supreme Court and this Court, the State raised for the first time the defense of sovereign immunity. Initially, plaintiffs object to this defense on the ground that the Supreme Court remanded for the sole purpose of directing a refund. For several reasons, we reject this attempt to limit or avoid issues raised below.

(Continued from previous page)

grounded. In any event, all these cases long predate the development of modern § 1983 law, beginning with *Monroe v. Pape*, 365 U.S. 167 (1961). Finally, none of the cases cited by plaintiffs, except *Atchison*, address the question raised in this case, namely, whether an action seeking a refund of unconstitutionally levied taxes survives a state's assertion of sovereign immunity; and *Atchison* discusses sovereign immunity only obliquely: "If he [the defendant Secretary of State] had no right, as he had not, to collect the money, his doing so in the name of the State cannot protect him." 223 U.S. at 287. *Atchison* previews the Court's recent decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, ___, 58 U.S.L.W. 4665, 4668-69 (June 4, 1990), that due process requires that states provide a meaningful remedy for taxpayers challenging the constitutionality of their tax obligations. *Atchison* does not, however, say that a taxpayer may overcome sovereign immunity in a suit brought directly under the Fourteenth Amendment. Recent Eleventh Amendment decisions demonstrate the Supreme Court's unwillingness to override sovereign immunity absent a clear statement by *Congress* to that effect. See, e.g., *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). Federal sovereign immunity was not an issue in *Bivens* and its progeny because those cases involved suits not against the sovereign but against federal officials in their personal capacities. See *Carlson v. Green* 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).

The State first responded to the complaint by filing a motion to dismiss, asserting the constitutionality of its taxation scheme. That motion was granted by the superior court. As a matter of pleading, therefore, the State was not at that time required to file an answer or affirmative defenses – which were due only ten days after the motion was denied. V.R.C.P. 12(a). The United States Supreme Court ultimately denied the State's motion, and, until remand, no obligation to plead an affirmative defense existed. Unless somehow barred by the United States Supreme Court's mandate, the State's answer and affirmative defenses, filed September 12, 1985, were timely.[8] See *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 515 n.19 (1982) (sovereign immunity defense may be raised on remand after appeal from lower court's dismissal of action on the pleadings). Therefore, plaintiffs' reliance on cases barring new issues after remand, when those cases had already been tried prior to appeal, is unavailing. The Supreme Court explicitly recognized that a full record had not been developed but that the "action was dismissed for failure to state a claim before an answer was filed." *Williams v. Vermont*, 472 U.S. at 28.

Plaintiffs suggest that their case was remanded from the Supreme Court "with specific instructions." To the contrary,

> in light of the fact that the action was dismissed on the pleadings, and given the possible relevance of state law, we express no opinion as to the appropriate remedy.

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[8] On September 9, 1985, this Court remanded the matter to Washington Superior Court.

> We hold only that, when the statute is viewed on its face, appellants have stated a claim of unconstitutional discrimination. The decision below is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

472 U.S. at 28 (citation omitted). It is clear that nothing more than the granting of the motion to dismiss was reversed; nothing else was decided. If further support were needed, it is supplied by the recent decision noting that "after invalidating a state tax scheme on Commerce Clause grounds, [the Supreme Court has] left state courts with the initial duty upon remand of crafting appropriate relief in accord with both federal and state law." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, ___, 58 U.S.L.W. 4665, 4669 n. 16 (June 4, 1990) (citing *Williams v. Vermont* as an example); accord *American Trucking Ass'ns v. Smith*, ___ U.S. ___, ___, 48 U.S.L.W. 4704, 4707 (June 4, 1990).

The Supreme Court, by its mandate, made no decision regarding affirmative defenses or remedial issues which might arise under state or federal law, or which might affect one or another remedy. The State was not precluded from arising a defense such as sovereign immunity.

2. Due Process Requirement of Remedy for Constitutional Violation

Plaintiffs argue that the Fourteenth Amendment prohibition against deprivation of property without due process of law[9] requires that they be afforded a remedy to

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[9] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

secure return of improperly exacted taxes. They are correct.

> To satisfy the requirements of the Due Process Clause . . . in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy" for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

McKesson Corp. v. Division of Alcoholic Beverages, ___ U.S. at ___, 58 U.S.L.W. at 4671 (citation and footnote omitted). "[A] ruling that a tax is unconstitutionally discriminatory under the Commerce Clause places substantial obligations on the States to provide relief. . . . " *American Trucking Ass'ns v. Smith*, ___ U.S. at ___, 58 U.S.L.W. at 4708.

Vermont must afford a remedy and a meaningful remedy, but not any particular remedy. "[S]ome form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), *quoted in McKesson Corp.*, ___ U.S. at ___ n.17, 58 U.S.L.W. at 4670 n.17. But that remedy is not, as a matter of constitutional necessity, a plenary suit in the court of general jurisdiction.

Our Legislature has provided a specific administrative procedure to afford plaintiffs the remedy to which they are constitutionally entitled. 32 V.S.A. § 8914 states:

> Any overpayment of [the motor vehicle purchase and use] tax as determined by the commissioner shall be refunded.

Plaintiffs concede that § 8914 covers unconstitutional taxes as well as arithmetic errors: "The statute makes not distinction between overpayments due to unconstitutionality or other causes." Brief for Appellants Williams and Levine at 19; Brief for Appellant Woodard at 27. See also *United States v. Dalm*, 110 S. Ct. 1361, 1368-69 n.6 (1990) ("The common sense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all. . . . The word ['overpayment'] encompasses 'erroneously,' 'illegally,' or 'wrongfully' collected taxes. . . . ").

Prior to the United States Supreme court's decision, the remedy provided by § 8914 was not available to Williams and Levine to the extent they challenged the facial validity of § 8903, because the Commissioner of Motor Vehicles is not authorized to rule upon the constitutionality of the *statutes* he is bound to administer. See *Westover v. Village of Barton Elec. Dep't*, 149 Vt. 356, 357, 543 A.2d 698, 699 (1988). Nevertheless, after the Supreme Court's ruling that the use tax statute is facially unconstitutional, a complaint to the Commissioner under § 8914 would not have been futile.[10] The Commissioner at that point would not have been required to address the constitutionality of the statute, for that question had been

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[10] Neither § 8914 nor any other provisions of Chapter 219 of Title 32 ("Motor Vehicle Purchase and Use Tax") specify a limitations period for actions before the Commissioner pursuant to § 8914. Cf. 12 V.S.A. § 517 (one-year limitation period on actions in court to recover taxes paid under protest). We do not here decide what, if any, statute of limitations is generally applicable to such actions.

decided; he would have been faced instead with three potential questions: Did the Department in fact *administer* the use tax statute in a manner that discriminated against nonresidents? If not, did the Department's enforcement of the tax, eventually pursuant to Rule 86-28-E, comply with the statute? If it did comply with the statute, did the practice violate the Commerce or Privileges and Immunities Clauses?[11] Plaintiff Woodard also challenged the Department's practice on statutory grounds, and raised additional constitutional challenges to the use tax *as administered* in the case of Vermont residents who registered their cars out of state before bringing them to Vermont. The Commissioner had jurisdiction to decide all of these claims. See *Alexander v. Town of Barton*, 152 Vt. 148, 151, 565 A.2d 1294, 1296 (1989) (while administrative agencies cannot rule on the constitutionality of legislation, they can adjudicate constitutional questions in determining validity of statutorily-delegated agency practices); *Christian Brothers Institute of New Jersey v. Northern New Jersey Interscholastic League*, 86 N.J. 409, 416, 432 A.2d 26, 29 (1981) (administrative agency may rule on constitutional issues relevant and necessary for resolution of questions within scope of its jurisdiction); 4 K. Davis, Administrative Law Treatise § 26:15, at 480 (2d ed. 1983) (exhaustion of administrative remedies "may be required when a factual context is needed for deciding the constitutional question or when the objecting party may prevail

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[11] The United States Supreme Court declared the tax scheme facially invalid under the Equal Protection Clause; Williams and Levine continue to argue that the statute, even as interpreted and administered by the Department, violates the Privileges and Immunities and Commerce Clauses.

on nonconstitutional grounds"). The first question posed by Williams and Levine, in particular, was suited to agency determination. See *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review."). All plaintiffs in this case, therefore, had an available remedy in § 8914 but chose not to pursue it.

One further point must be addressed. In *American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), this Court considered a constitutional challenge to statutes imposing certain fees on foreign-registered trucks. While ruling that the statutes at issue violated the Commerce Clause of the United States Constitution, we upheld the superior court's refusal to order a refund of fees collected pursuant to the objectionable statutes. "This action for a tax refund is a suit against the state, and therefore, is barred by sovereign immunity unless the state has waived its immunity." *Id.* at 587-88, 508 A.2d at 414. We found that 23 V.S.A. § 3020(b), authorizing the Commissioner to refund a tax or fee that "has been illegally or erroneously collected or computed," did not constitute a waiver of sovereign immunity. The statute, we wrote, "merely provides for a refund mechanism if errors are made in determining what tax is imposed. . . . Here, the Vermont legislature has not inferentially indicated its intent to provide the amounts paid to the state

under a statute later declared invalid." *Id.* at 588, 508 A.2d at 414.

We recognize that our construction of 23 V.S.A. § 3020(b) in *American Trucking Ass'ns* is incompatible with the meaning we have ascribed to 32 V.S.A. § 8914 in this opinion. The term "overpayment" in § 8914, if anything, implies a narrower authority to award refunds than the term "illegally or erroneously collected" in § 3020(b); yet, as we have explained, § 8914 does provide a remedy to recover "amounts paid to the state under a statute later declared invalid." The Court's confined reading of § 3020(b) was grounded in an understanding of common-law sovereign immunity that is no longer tenable after the Supreme Court's recent unanimous decisions in *McKesson Corporation* and *Howlett v. Rose*. Thus, in *American Trucking Ass'ns*, we said that "the state cannot be sued without its consent for injuries resulting from the exercise of functions essentially governmental in character." 146 Vt. at 587, 508 A.2d at 413. But due process may require that states entertain suits against them though they have not consented. That is the holding of *McKesson*: "[I]f a State places a taxpayer under duress promptly to pay a tax when due and regulates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." ___ U.S. at ___, 58 U.S.L.W. at 4668-69 (footnotes omitted). *Howlett* specifically holds that the Supremacy Clause does not permit a state law defense of sovereign immunity in a § 1983 action brought in state court where a sovereign immunity defense would not be available had the action

been brought in a federal forum. ___ U.S. at ___, 58 U.S.L.W. at 4761. "[A]s to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common law heritage." *Id.* at ___, 58 U.S.L.W. at 4763. The import of these decisions cannot be avoided. Section III of the Court's opinion in *American Trucking Ass'ns* should be considered overruled.

Common-law sovereign immunity, however, is not vitiated entirely. A state must provide some remedy to permit the recoupment of unconstitutionally exacted taxes, but it may choose, and limit, the remedy, so long as it comports with due process principles. *McKesson* notes that "States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions." ___ U.S. at ___, 58 U.S.L.W. at 4674. The Court added that "[s]uch procedural measures would sufficiently protect States' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation." *Id.* Vermont has consented to suit for the recovery of wrongfully levied purchase and use taxes by providing in 32 V.S.A. § 8914 for administrative complaint to the Commissioner of Motor Vehicles. Because that remedy provides taxpayers with due process – indeed, plaintiffs have not challenged the sufficiency of the remedy – the defense of sovereign immunity in a court of plenary jurisdiction remains intact and available to the State.

The superior court could not award a refund of taxes absent the State's waiver of immunity, and, therefore, properly dismissed plaintiffs' claims for monetary relief.

III. Declaratory Relief

Following the Supreme Court's ruling that the statute contravened the Equal Protection Clause, *Williams v. Vermont*, 472 U.S. at 28, the State argued on remand that the Department had not in fact administered the tax in a discriminatory manner, and, to clarify its position, had promulgated Rule 86-28-E. See note 3, *supra*. The superior court agreed, holding that the new rule eliminated the discriminatory treatment of nonresidents and thereby rendered the request for declaratory judgment moot. On appeal, Williams and Levine contend that the statute, even as interpreted and administered by the Department, continues to violate the Privileges and Immunities and Commerce Clauses. They also argue, in an effort to avoid the conclusion that the new rule has rendered their equal protection challenge moot, that the rule contradicts legislative intent and the plain meaning of 32 V.S.A. § 8911(9).

In his complaint and on appeal, Woodard also requests a declaratory ruling that the Department's enforcement of its tax scheme violates the governing statute. Woodard further raises state and federal constitutional challenges to the scheme as administered. In Woodard's case, the superior court also dismissed the complaint, but reached the merits of his claims, essentially granting declaratory relief to the State.

All three plaintiffs' requests for declaratory rulings on federal constitutional issues assertedly arise under 42

U.S.C. § 1983. Of course, plaintiffs' claims that are grounded on a violation of a state statute or the Vermont Constitution are not properly brought under 42 U.S.C. § 1983 because that statute remedies the deprivation of rights secured by federal law. See *Maine v. Thiboutot*, 448 U.S. at 4. As to all claims, we find that the superior court did not have jurisdiction to award declaratory relief. The § 1983 claims, however, raise certain additional considerations, as addressed below.

Vermont law affords the superior court general authority to grant declaratory relief. 12 V.S.A. §§ 4711-25. Moreover, the Administrative Procedure Act provides for declaratory judgment actions to challenge the "validity or applicability of a rule . . . if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." 3 V.S.A. § 807. The declaratory remedy, however, does not enlarge the jurisdiction of the court. *Demag v. American Ins. Co.*, 146 Vt. 608, 610, 508 A.2d 697, 698 (1986). If the Legislature has designated another tribunal to hear certain claims, the declaratory judgments statutes do not *ipso jure* vest jurisdiction over those claims in the superior court. In *Demag*, for example, the plaintiff sought a declaration that she was entitled to receive certain death benefits under the Workers' Compensation Act. We held that the superior court had no jurisdiction over this claim, "because plaintiff failed to avail herself of the administrative remedy provided by the Workers' Compensation Act." *Id.* Similarly, in *Trivento v. Commissioner of Corrections*, 135 Vt. 475, 380 A.2d 69 (1977), we considered whether the superior court had

jurisdiction to issue a declaratory ruling on the constitutionality of a state prisoner's confinement. We held that it did not.

> Where the Legislature has provided that certain rights (here the right to have one's sentence modified) are enforceable in specified tribunals (here the superior court in which sentence was imposed), the declaratory judgments vehicle should not be used to frustrate the legislative choice. To do so would be to ignore the message of 12 V.S.A. § 4711 and our prior holdings that the Act has not enlarged the subject matter jurisdiction of the courts.

Id. at 478, 380 A.2d at 71-72; see also *Petition of D.A. Associates*, 150 Vt. 18, 20, 547 A.2d 1325, 1326-27 (1988) ("when an administrative remedy is established by statute or regulation, relief must not only be sought in accordance therewith, but must first be exhausted before recourse to the courts is available"). But see *Neal v. Brockway*, 136 Vt. 119, 121, 385 A.2d 1069, ___ (1978) ("bare existence of another adequate remedy is not a bar to a declaratory judgment proceeding where a controversy exists").

Declaratory relief would not give plaintiffs what they want; it would only advise the ultimate decision-maker on points of law necessary to get a refund. As we have made clear, the superior court does not have jurisdiction over the refund claims in this case absent a waiver of sovereign immunity. To the extent plaintiffs seek declaratory rulings in order to obtain their refunds, the superior court likewise lacks jurisdiction to award the requested declaratory relief. As in *Trivento* and *Demag*, plaintiffs may pursue their claims in another forum; the general

statutory authority vested in the superior court to award declaratory judgments does not permit litigants to raise such claims, by their own bootstraps, where jurisdiction is otherwise lacking. The judiciary is not empowered to render advisory opinions the sole purpose of which is to aid in the resolution of a dispute that properly belongs in another tribunal. See *Lace v. University of Vermont*, 131 Vt. 170, 175, 303 A.2d 475, 478 (1973).

Plaintiffs' requests for declaratory relief could not be decided in the superior court, therefore, unless such requests are justiciable on their own account, detached from the refund claims.[12] The availability of declaratory or any other particular relief does not alter the fundamental prerequisite to judicial authority – a justiciable controversy.

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[12] Even if the declaratory issues were justiciable, "the courts look with disfavor on piecemeal litigation of the matters in controversy." 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 2759, at 648 (2d ed. 1983) (hereinafter Wright, Miller & Kane). Thus, "federal courts have expressed a strong preference that issues of state taxation be litigated in state courts through a suit for refund rather than in federal courts through a suit for declaratory or injunctive relief." *Alcan Aluminium [sic] Ltd. v. Department of Revenue of State of Oregon*, 724 F.2d 1294, 1298 (7th Cir. 1984). The disfavor toward piecemeal litigation, however, is not generally treated as jurisdictional, but rather as a matter of discretion. See 10A Wright, Miller & Kane § 2759; cf. 12 V.S.A. § 4716 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."). Similarly, "[d]eclaratory relief ordinarily should not be granted if a special statutory proceeding has been

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> The function of a declaratory judgment is to provide a declaration of rights, status and other legal relations of parties to a justiciable controversy. Without such justiciable controversy being present, the declaratory judgment can provide no more than an advisory opinion, which our State judiciary does not have the constitutional power to render.

Lace v. University of Vermont, 131 Vt. at 175, 303 A.2d at 478 (citations omitted). "It is well settled that an action for declaratory relief must be based on an actual controversy; the claimed result or consequences must be so set forth that the court can see that they are not based upon fear or anticipation but are reasonably to be expected." *Robtoy v. City of St. Albans*, 132 Vt. 503, 504, 321 A.2d 45, 46-47 (1974); accord *Beecham v. Leahy*, 130 Vt. 164, 168, 287 A.2d 836, 838 (1972). The administrative Procedure Act codifies these limits on the court's power over suits testing the validity of agency rules by requiring "that the

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provided for the determination of particular questions." 10A Wright, Miller & Kane § 2758, at 642. This rule of abstention may be circumvented in the court's discretion. For example, in *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964), which upheld the constitutionality of federal law prohibiting racial discrimination at restaurants, the Supreme Court reached for the merits although the plaintiffs had not pursued their claims as provided by statute, because interference with government action had already occurred (the district court had enjoined the government from enforcing the Civil Rights Act against the restaurant) and the constitutional issues were already before the Court in a companion case. *Id.* These considerations are not present here, and we do not decide whether the rule applied in *Demag* and *Trivento* would give way were similar considerations present.

rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." 3 V.S.A. § 807.

Our law conforms with the longstanding federal rule that the availability of declaratory relief turns on whether "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). A mere abstract question or hypothetical threat is not a sufficient basis for a declaratory judgment. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). Extra caution is advised in cases involving political and constitutional questions. "The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947).

It is apparent in the present cases that, once severed from the refund claims, no justiciable controversy exists. Williams has now lived in Vermont close to ten years, and we may take judicial notice that he has been a member of the bar of this Court for that period. Levine has lived in the state even longer. Neither suggests a reasonable fear or anticipation of being subject again to the allegedly unconstitutional use tax – that is, of purchasing and registering a vehicle out of state, while enjoying residency in another state, and subsequently seeking to register the car in Vermont. Similarly, Woodard is not likely

again to purchase a car out of state and again fail to secure Vermont registration by mail at the outset, thereby avoiding the potential of double taxation.

The United States Supreme Court's opinion in *Golden v. Zwickler* is particularly instructive. Zwickler had distributed an unsigned political handbill, castigating a certain congressman for his stance on a foreign-aid issue. For that act, he was prosecuted under a New York statute barring anonymous election literature. His conviction was reversed on state law grounds, but the statute remained in force. Zwickler then brought suit for a declaratory judgment on the statute's validity. 394 U.S. at 104-05. Writing for a unanimous court, Justice Brennan noted that the criticized congressman had left that office for a fourteen-year term as a state supreme court justice, and concluded: "We think that under all the circumstances of the case the fact that it was most unlikely that the Congressman would again be a candidate for Congress precluded a finding that there was 'sufficient immediacy and reality' [to justify issuance of a declaratory judgment]." *Id.* at 109 (quoting *Maryland Casualty*, 312 U.S. at 273).[13]

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[13] The facts in the present cases and in *Zwickler* must be distinguished from those cases where plaintiffs demonstrate a strong likelihood of a recurrence of the controversy in litigation. For example, in *Washington v. Harper*, ___ U.S. ___, 58 U.S.L.W. 4249 (Feb. 27, 1990), a mentally ill prisoner sought declaratory relief regarding prison procedures for forced medication. The Supreme Court there took particular note that given Harper's medical history, it remained likely that officials would seek to administer antipsychotic medications to him in the future. *Id.* at ___, 58 U.S.L.W. at 4252. The Court accordingly reached the merits.

Declaratory relief is, and can be, sought in this case only to further the true goal of obtaining other relief, namely a refund. Because the superior court has no jurisdiction over the refund claim, it also has no jurisdiction to issue advisory declaratory relief.

The superior court's declaratory judgment ruling is vacated; otherwise, its orders dismissing the two complaints are affirmed.

FOR THE COURT:

/s/ Mathew J. Katz
Superior Judge,
Specially Assigned

STATE OF VERMONT
Office of Secretary of State

I certify that the attached is a true copy of the adopted rule, "Motor Vehicle Purchase and Use Tax" (86-28-E) of the Agency of Transportation, Department of Motor Vehicles. The effective date of this rule is July 5, 1986.

SEAL

February 26, 1987
Date

/s/ Paul D. Guare
Deputy Secretary of State

The purpose of this rule is to interpret, and to assist in the implementation of 32 V.S.A. §8911(9), and to be declarative of the practice used by the Department of Motor Vehicles with respect to its administration.

The credit provided in and by 32 V.S.A. §8911(9) shall be available to the following persons in the circumstances set forth below:

1. A resident of Vermont, as defined in 32 V.S.A. §8902(2), shall be entitled to receive a pro rata credit for a sales or use tax paid to another state upon the submission to the Department of an application for Vermont registration, and the payment of the registration fees if:

a. The state in which the vehicle was acquired would grant the same pro rata credit for Vermont tax paid under similar circumstances, and

b. The tax paid to that state is nonrefundable, and

c. The vehicle acquired is a pleasure car, and

d. The person applying for a Vermont registration has not previously registered that vehicle in the state where it was acquired or in any other state.

2. For the purpose of this rule, the applicant shall have the burden of proving to the Department's satisfaction that

a. The state in which the vehicle was acquired would grant the same pro rata credit for Vermont tax paid under similar circumstances, and

b. The tax paid is nonrefundable, and

c. That the person applying for a Vermont registration has not previously registered that vehicle in the state where it was acquired or in any other state.

3. For the purpose of this rule, a vehicle shall not be considered to have been registered if the applicant has been issued an intransit permit.

§ 8911. Exceptions

The tax imposed by this chapter shall not apply to:

(1) motor vehicles owned or registered by any state or province or any political subdivision thereof;

(2) motor vehicles owned and operated by the United States of America;

(3) motor vehicles owned and registered by religious or charitable institutions or volunteer fire companies;

(4) motor vehicles owned and operated by a dealer and registered and operated under the provisions of sections 451-468 inclusive of Title 23;

(5) nonregistered motor vehicles other than tow or repairman vehicles;

(6) [Repealed.]

(7) motor vehicles, title to which on the effective date of this chapter is in the owner seeking registration thereof;

(8) motor vehicles transferred to the spouse, mother, father or child of the donor or subsequently transferred among such individuals provided such motor vehicle has been registered in this state in the name of the original donor;

(9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting

such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference;

(10) motor vehicles registered in Vermont by the transferor and transferred between that individual and a business entity controlled by him, if the transfer is exempt under section 351 of the United States Internal Revenue Code in effect July 1, 1966;

(11) motor vehicles owned or purchased in another state by a member of the armed forces on full time active duty or his spouse upon which a purchase, use or sales tax has been paid in another state, except that, if that tax is less than the tax payable in this state but for this subdivision, the tax applies in the amount of the difference;

(12) motor vehicles owned and operated by physically handicapped persons for whom the vehicle's controls have been altered to enable such persons to drive. This exception shall apply only when such handicapped person has been certified exempt from the tax by the commission of motor vehicles under the provisions of section 8901 of this title;

(13) motor vehicles obtained from the government as excess government property, or vehicles purchased with 100 percent federal funds and used for federally suported [sic] local programs. – 1959, No. 327 (Adj. Sess.), § 10, eff. March 1, 1960; amended 1966, No. 66 (Sp. Sess.), § 5; 1967, No. 116, § 5, eff. April 17, 1967; 1975, No. 96, § 1, eff. April 30, 1975; 1977, No. 258 (Adj. Sess), § 4, eff.

April 19, 1978; 1979, No. 202 (Adj. Sess.), § 3, Pt. VI, eff. Sept. 1, 1980.